## IN THE MATTER OF THE DEPENDANTS OF LOW LIOK, DECEASED

**[O.C.J. (Mills J.) March 23, 1936]**

**[Johore Bahru Originating Summons No. 19 of 1936]**

*Workmen's Compensation — Death of employee — Deposit of compensation by employer with Commissioner — Absence of claims — Period of limitation — Workmen's Compensation Enactment, ss.10(i)(xi), 12(i).*

Where, after the death of a workman, his employer deposited with the Commissioner the full amount of compensation payable and at the Commissioner's inquiry, it was proved that the deceased had no dependant other than the workman's widow, to communicate with whom several attempts were unsuccessfully made, no claim having been put forth, the insurers applied to the Court for a return of the deposit.

**Held:** that, if after a lapse of reasonable time, and in this case 12 months from the date of the workman's death no claim is forthcoming, the Commissioner may repay the deposit to the employer.

ORIGINATING SUMMONS.

On the 14th May, 1935, one Low Liok, a workman employed by a contractor, Then Nam Sin, was killed in an accident in the course of his employment. On the 15th June, 1935 Then Nam Sin, through his insurers, deposited with the Commissioner for Workmen's Compensation, pursuant to the provisions of section 10(i) of the Workmen's Compensation Enactment, a sum of $810.00, being the full amount of compensation payable. On the 20th June, 1935, the Commissioner held an enquiry under section 10(vi) of the Enactment. The only witness at the said enquiry [162] was the employer, Then Nam [162] Sin. From the evidence given by him it appeared that on behalf of the workman he had made remittances, at irregular intervals during the past three years, to the workman's wife in China. He stated that he knew the widow, as she had formerly lived with the workman in this country, but that he was unaware of any other dependants. Several attempts were made to communicate with the widow in China without success, and no claimant being forthcoming the insurers applied for a return of the deposit.

Section 10(xi) of the Enactment provides that "If the Commissioner is satisfied after such enquiry as he may deem necessary that no dependant exists he shall repay the balance of the money to the employer by whom it was paid." The Commissioner, not being satisfied that no dependant existed applied to the Court for directions as to the lawful method of disposing of the deposit in his hands. Neither the employer nor his insurers appeared on the hearing of the application.

*Weiss,* the Commissioner, referred to section 12(i) of the Enactment which provides that no compensation for an accident resulting in death shall be recoverable unless a claim is made within six months of the death; and to the proviso (c) which provides that the failure to make a claim within the period above specified shall not be a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, absence from the State or other reasonable cause. Reference was also made to the corresponding provisions in the English Act whereby the period of six months is made to run from the date of the dependant's notice of the death. No guidance however could be obtained from the English Act as there is no provision therein for the making of any deposit. It was submitted that there was nothing applicable, either in the rules relating to funds deposited in Court, or in the law of limitation regarding a claim to a legacy or to a distributive share in an intestate estate.

**Mills J.** in an oral decision given in Chambers held that a dependant ought ordinarily to be imputed with knowledge of the death of the workman after the lapse of a reasonable time; that six months was a reasonable time; and that a dependant should be nonsuited for laches if no claim were made within six months thereafter.

An order was made accordingly that the deposit be held by the Commissioner until the expiration of a period of twelve months from the date of the death of the workman, and that if no claim thereto should then have been made, the Commissioner should be at liberty to repay the deposit to the employer.

*Order accordingly.*

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## [163] PRIVY COUNCIL REPORTS [163]

## CENTRAL BANK OF INDIA, LTD. v. GUARDIAN ASSURANCE CO., LTD.

**[P.C. (Lords Atkin, Alness and Maugham) March 20, 1936]**

**[Privy Council Appeal No. 26 of 1934]**

*Insurance — Loss by fire — Claim — Proof — Circumstantial evidence — Practice — New plea — Issue or objection abandoned or not raised in Lower Courts.*

Claims for compensation for loss by fire, like certain other claims against insurance companies, cannot in general be tested and disproved otherwise than by circumstantial evidence.

The Board will not consider an issue or objection which has been abandoned or not raised in the Lower Courts. *Lingangowda* v. *Basangowda,* (1927) 54 I.A. 122; *Udyma Lebbe Ahamath* v. *Levena Marikar,* [1931] A.C. 799; *Skinner* v. *Bank of Upper India* (1935) 62 I.A. 115 followed.

PRIVY COUNCIL — Appeal from the High Court, Lahore, India.

*A. J. Miller, W. Wallach* and *Miss A. Mehta* for the appellants.

*Fergus S. Morton, David Davies* and *L. M. Jopling* for the respondents.

*Cur. Adv. Vult.*

The judgment of the Board was delivered by —

**Lord Maugham:** This is an appeal from a decree of the High Court of Judicature at Lahore, dated 20th May, 1932, which reversed a decree of the subordinate Judge of Lahore, dated 16th July, 1929, and dismissed the plaintiff's suit with costs. The decree was made in an action commenced by plaint, dated 21st December, 1927, brought by the appellants, the Central Bank of India, Limited, and Rustomji (called in what follows Seth Rustomji), a nominal respondent to this appeal against the Guardian Assurance Company, Limited, on certain policies of insurance whereby the plaintiffs (or one of them) were insured against loss by fire. The insurance related to a stock of wheat, wheat products and gunny bags stored in certain godowns of mills which belonged to Seth Rustomji. The buildings and the stock were charged or hypothecated to the present appellants called hereafter the Central Bank. Seth

Rustomji was not represented on the appeal before their Lordships. As will appear from the facts to be stated there emerged at the trial two questions: first, whether the plaintiffs had proved (the onus being on them) that the large amount of stock alleged to have been destroyed by fire had in fact been so destroyed; secondly, whether under a clause in the policies (cl. 13) the claim, if it was proved to be of a fraudulent character, had the effect in the circumstances of effecting a forfeiture of all the rights of the plaintiffs (or either of them) to recover under the policies. The onus of proving a fraud was on the insurance company, and, as will appear, the position of the Central Bank and Seth Rustomji in relation to the charge of fraud was by no means identical.

The subordinate Judge of Lahore held that the plaintiffs had proved a loss as claimed in respect of the wheat, wheat products and gunny bags destroyed by the fire, and he accordingly decided that the plaintiffs were not guilty of the fraud alleged against them, namely that of grossly exaggerating the claim. He therefore made a decree by which the insurance company was ordered to pay to the plaintiffs the sum of Rs. 3,98,200 with certain costs, and there was a direction that out of the decretal amount the Central Bank would have prior claims on account of mortgage money and interest. There was an appeal from this decree to the High Court of Judicature at Lahore. The appeal was heard by Dalip Singh and Agha Haidar JJ. Judgment was delivered on 20th May, 1932, by Dalip Singh J., with which judgment Agha Haidar J. agreed. The learned Judges came to a conclusion different from that of the trial Judge. They considered it to be proved that the amount of the stock destroyed was grossly exaggerated to the knowledge of Seth Rustomji and that the claim was therefore fraudulent so far as he was concerned. In the reasons given for the judgment it is stated that counsel for the respondents on that appeal, namely for the Central Bank and Seth Rustomji, had conceded that —

> as the insurance was a joint insurance fraud on the part of either of the plaintiffs would equally affect the claim of the other plaintiff though the insurable interests of the two were different.

The Court in these circumstances thought it unnecessary to decide whether the Central Bank also were concerned in the making of a fraudulent claim. In the result the action was dismissed with costs. From this decision the Central Bank has appealed. It is plain from this bare outline of the facts that the main questions that arise are pure questions of fact on which [164] the trial [164] Judge, who heard the greater number of the witnesses, and the High Court have taken opposite views. In considering these questions their Lordships have throughout borne in mind the importance of attaching weight to the views of the trial Judge and also to the circumstance that, so far as the issue of fraud is involved in the case, those who allege fraud ought to establish it by something more than grave suspicion, or in other words that the charge ought to be clearly established. With these preliminary observations it now becomes necessary to state the more important facts of the case, omitting however reference to a number of matters which seem to their Lordships inconclusive or of relatively little moment.

Seth Rustomji was from 1918, until the date of the fire on 25th December, 1926, the owner of some large flour mills situate at Badami Bagh, Lahore. He happened to be a member of the Local Advisory Committee of the Central Bank, and in the year 1921 that Committee reported that he was very respectable and worth 20 lakhs.

In the year 1918 he borrowed from the Central Bank one lakh which loan was never secured (Account No. 1). In November, 1920 he was granted by the Central Bank a credit of a further two lakhs which purported to be secured by a mortgage of the stock at his mill (Account No. 2). In December, 1921, he was granted by the Central Bank a further credit of three lakhs on the same security (Account No. 3). The stock at his mills was in the ordinary course insured against fire. This was effected by a number of different policies granted by the Guardian Assurance Company, Limited, the defendants in the action (called below "the insurance company"). The stock of wheat, wheat products and gunny bags with which this action is concerned was that situate for the time being in certain godowns marked or described in a plan used at the trial as godowns I, J., T and X. There were four policies for Rs. 3,25,000 in all relating to the wheat and wheat products situate in those godowns. There was another policy by which "new gunny bags in bales" situate in such godowns were insured for Rupees 55,000. All the policies were assigned absolutely to the Central Bank as part of the bank's security. Each of them contained a condition (condition 13 in the original policy) providing that —

> if the claim made should be in any respect fraudulent or if any fraudulent means or devices should be used by the insured or anyone acting on his behalf to obtain any benefit under the policy, all benefit under the policy should be forfeited.

Their Lordships note that the form of charge or hypothecation given when the loans were granted provided for possession of the stock being given to the Central Bank and for delivery to them of the keys of the godowns; and it seems that it was the usual practice on granting such loans to place a godown keeper in charge of the hypothecated stock. Seth Rustomji, however, was unwilling to allow a godown keeper on behalf of the Central Bank, and the loan was apparently sanctioned on these terms without, however, any alteration of the form of mortgage. It was stipulated that Seth Rustomji should maintain a margin of stock of a value of 25 per cent. above his loan. He sent to the Central Bank at first fortnightly and afterwards weekly statements of his stock. These weekly statements continued to be rendered and the claim made by the Central Bank and Seth Rustomji was admittedly based on the last weekly statement sent to the Central Bank before the fire, namely, that dated 20th December, 1926, which purported to show a total amount of stock and gunny bags in the godowns I, J, T, and X, and also in three other godowns which were not injured in the fire amounting in value to Rs. 5,11,680. It should be mentioned here that the person who prepared the statement was not produced as a witness, nor was his absence accounted for. After the fire notice was given to the insurance company of a loss amounting to Rs. 4,00,946.13.0 made up as follows: Wheat and its products amounting to Rs. 3,50,282-14-0,

empty gunny bags Rs. 50,663.15.0. The total sum insured on wheat and its products at the date of the fire was only Rs. 3,50,000; and the claim of the plaintiffs was therefore for Rs. 4,00,663.15.0. They also claimed at the trial interest at the rate of 6 per cent. per annum from the date of the fire.

There had been certain inspections of the godowns on behalf of the Central Bank: and certain inspection reports made by Mr. J. F. Kalianiwala, an inspector of godowns in the employ of the Central Bank, were put in evidence. There was no evidence of any reports made after 15th October, 1925. In the report of 19th December, 1924, it was stated that Seth Rustomji was not maintaining a stock register similar to that kept at other factories and that the basis of checking the approximation of stock was from statements made by employees at the mill. The report also said that no regular inspection had been made for quite a long period "as the party," meaning Seth Rustomji, "was known to be sensitive to such inspections." Further, [165] Seth Rustomji [165] had already written to the Central Bank that he would shortly be selling the mill and adjusting his account. It was in these circumstances that a somewhat remarkable incident occurred. On 22nd April, 1926, Mr. R. Jariwala, the manager of the Lahore branch of the Central Bank, wrote to Seth Rustomji as follows:

> "Mr. Thakur has been asked by Head Office to minutely go through all the finances of this branch, and as a part of his duty he has to check the stock at your mills minutely. I shall therefore thank you to please let him know the time suitable to you on Sunday at which he could carry on the work of inspection at the mills."

At this date the weekly stock statement sent by Seth Rustomji to the Central Bank purported to show that at that date he had stocks worth Rs. 6,98,760 including more than 2,000 tons of coal. His unsecured loan of one lakh was still owing; his credit of two lakhs on Account No. 2 had been exhausted, and no drawings had recently been made against that account; the credit of three lakhs (Account No. 3) showed a debit balance of over three laks. He no doubt had other property besides his mill and the stock therein, but it was for the most part heavily encumbered, and about this time a cotton mill of which he was the owner at Amritsar was sold by the Punjab National Bank as mortgagee. In answer to the request of the Central Bank, Seth Rustomji wrote a letter in which he stated that he had never been asked to have his stocks minutely examined before. He added that if the bank should insist it would be better that he should "dispose of his property at any price and at any sacrifice immediately and liquidate his debt" to the bank. But, he said, negotiations were being carried on and he had every hope that his properties would be sold within the next six months. He trusted that the bank would not insist that his stocks should be examined in detail thus putting him unnecessarily into an awkward and perhaps disgraceful position before the public eye, for, he said, such matters spread rapidly and got known to the public very soon. He then offered to send title deeds of property worth about two lakhs of rupees as further security if these properties were not immediately sold, and if they were, to reduce his indebtedness to the bank substantially.

The managing director of the Central Bank was not satisfied with this explanation and he pointed out that the checking of stock by a bank officer on a special date was in the ordinary course of business. On 8th May, Seth Rustomji wrote saying that he was turning his mill into a joint stock company, that a minute examination of the stock would create a very bad impression on the public, and that he would send the title deeds of two properties of his as further security. On 13th May this proposal was accepted by the Central Bank, but the directors added that they desired that Seth Rustomji should make all possible arrangements to see that "his accounts were adjusted within the course of three months." They also said that they were asking Mr. Thakur to make a cursory examination of the stocks and that they hoped that Seth Rustomji would not object to this. In his answer Seth Rustomji said nothing about consenting to such a cursory inspection, and it was never made by Mr. Thakur. Title deeds of the two properties referred to were promptly sent to the local agent of the Central Bank.

One of these properties was Seth Rustomji's share of some property known as the Punjab Ice House. The other deeds related to certain trust property of which Seth Rustomji was a trustee. The trust, he stated at the trial, was a family trust, and no details of it were given in evidence by him or on his behalf, though of course he knew all the facts and the defendants did not. Seth Rustomji, on 12th June, 1926, declared that "no adverse claim of any kind existed against the properties in question"; but the Central Bank was compelled at some later date to return the title deeds after ascertaining that it was a trust property. Whatever excuse might be put forward in an endeavour to palliate the conduct of the trustee of a family trust, in charging the trust property to secure his own debt, it seems to their Lordships beyond dispute that his conduct in this matter is very strong evidence of the desperate straits to which he was put for money at that time; and it is certainly extraordinary that he should have preferred to embark on so dubious and improper a transaction rather than to allow the agent of the Central Bank, who might well have been thought to be acting on behalf of an intending purchaser, to make a detailed examination of the stock of wheat and wheat products in the godowns on a Sunday while the mill was not working.

There is other cogent evidence tending to show that all was not well with the mill and with the financial position of Seth Rustomji in the year 1926. Their Lordships, with the assistance of counsel, have carefully examined the overdrafts on the accounts of Seth Rustomji with the Central Bank and with the Punjab National Bank, Limited, and from these it appears that [166] the total bank overdrafts of Seth [166] Rustomji had grown more or less steadily from the year 1921 from the sum of say, two lakhs, to a sum exceeding ten lakhs in the year 1926. The total overdrafts on 30th June, 1926 amounted to Rs. 10,40,312, and although there was a slight reduction during the later part of the year this was due to sales of property by the banks as mortgagees or by Seth Rustomji himself. It may here be mentioned that in September,

1926 Seth Rustomji sold a large house in Ferozepore Road, Lahore, in which he had lived and went to live in a smaller house. The house he sold appears also to have belonged to a family trust of which Seth Rustomji was one of the trustees. Nevertheless he paid, out of the proceeds of sale, Rs. 60,000 to the Punjab National Bank and Rs. 79,000 to the Central Bank, personal debts of his own. The books and other documents showing the accounts of the mill had been kept in an office in the private house in Ferozepore Road, but after the sale all such books and papers are stated by Seth Rustomji to have been kept at the mill. [His Lordship then discussed the evidence in relation to the fire and proceeded.] The plaintiffs put in a claim, as already stated, for Rs. 4,00,663.15.0. The insurance company called for statements and affidavits in proof of this claim. On the 28th April, 1927 the insurance company stated that they had received the report of the assessors who had estimated the contents of the various godowns in question on the day of the fire as amounting to 4,335 bags of wheat and wheat products and 2,100 gunny bags in bales. The assessors valued the above stocks of wheat and products at Rs. 43,521 and of the gunnies at Rs. 1,050.

The insurance company, after observing that the stocks and values as claimed were very much in excess of those ascertained by the surveyors, begged to be furnished with copies of all documentary evidence in the possession of the claimants, i.e. documents, correspondence, returns, entries in books, ledger accounts, etc., which supported the stocks and values claimed. Some affidavits were filed and a good deal of correspondence followed. The insurance company was not satisfied and rejected the claim of the Central Bank and Seth Rustomji. The plaint was filed on 21st December, 1927.

Their Lordships have already observed that Seth Rustomji and a number of witnesses who had been employed by him at the mill including three of his sons, gave positive evidence at the trial that the godowns in question were or had been full to their roofs as above stated and the direct evidence of a number of witnesses of this kind cannot of course be rejected lightly or without very good grounds for its rejection. On the other hand, claims for loss by fire, like certain other claims against insurance companies, cannot in general be tested and disproved otherwise than by circumstantial evidence. There are in the present case special circumstances which, in their Lordships' view, agreeing with that of the two High Court Judges, make it impossible to have any doubt that the statements made by and on behalf of Seth Rustomji were untrue and untrue to his knowledge. [His Lordship then again discussed the evidence and proceeded]. For these reasons, as well as other reasons referred to in the judgment of Dalip Singh J., their Lordships have come to the same conclusion as that at which the High Court arrived.

The alleged loss was not proved by the plaintiffs in the action and there was sufficient evidence to justify the conclusion of the High Court that the claim was grossly exaggerated, and as Seth Rustomji must have been aware of this fact the claim must have been fraudulent, with the result that under condition 13 of the policy, all benefit was forfeited by Seth Rustomji. This however would not necessarily bar the claim of the Central Bank to whom the policies had been assigned in an absolute form in respect of the losses and damage which was proved or admitted to have been occasioned by the fire, namely, a loss of some Rs. 43,000. The difficulty here, as already mentioned, is that counsel who appeared on the appeal to the High Court for both Seth Rustomji and the Central Bank had taken the view that the insurance was a joint insurance and that fraud on the part of either of the plaintiffs would equally affect the claim of the other plaintiff even though the insurable interests were different. The learned Judge who delivered the judgment in the High Court observed in his concluding remarks that, in view of the concessions made by the learned counsel for the respondent, it was unnecessary to decide whether the Central Bank also were concerned in the making of a fraudulent claim.

Their Lordships have a difficulty in understanding what was meant by the concession that there was in this case a joint insurance, a phrase which seems to be applied accurately only in a case where an insurance is effected as regards property jointly owned by the assured. However, a number of points of some difficulty would arise if the claim of the Central Bank were to be considered on its merits so far as regards the Rs. 43,000, including questions of construction both of the original charge and of the policies [167] and of the documents passing between the insurance company and the Central Bank, and also questions under section 106, Evidence Act of 1872. Moreover it may well be that if a different course had been taken in the Courts below further evidence might have been called. It is observed that Mr. Jariwala who had made an affidavit on behalf of the plaintiffs on 16th August, 1927, was not called at the trial, and indeed no witness who could explain the course taken by the Central Bank was so called. Counsel for the plaintiffs is said to have observed that he did not consider it advisable to call Mr. Jariwala. On the whole, and bearing in mind the reluctance of this Board to consider an issue or an objection which has been abandoned or not raised in the lower Courts [see *Lingangowda* v. *Basangowda*, 54 I.A. 122 at p. 125; I.L.R. 51 Bom. 450; *Uduma Lebbe Ahamath* v. *Levena Marikar*, (1931) App. Cas. 799; 100 L.J.P.C. 211; 145 L.T. 650, at p. 801; *Skinner* v. *Bank of Upper India*, 1935 P.C. 108; 155 I.C. 743; 62 I.A. 115; 57 All. 314 P.C.] it appears that their Lordships would not be justified in allowing these questions to be raised on this appeal. In these circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs. [167]

*Appeal dismissed.*

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